



May 22, 2002

Ms. Marva Gay
Senior Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002-1700

OR2002-2757

Dear Ms. Gay:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 163299.

The Harris County Sheriff's Department Civil Service Commission (the "commission") received a request for "[a] true and correct copy of [a named individual's] Personnel File Maintained by the Personnel Division[.]" You claim that the requested information is excepted from disclosure under sections 552.024, 552.101, 552.102, 552.103, 552.117, 552.1175, and 552.119 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You claim that the requested information is excepted from disclosure under section 552.103. Section 552.103 provides in pertinent part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). A contested case under the Administrative Procedure Act ("APA") is litigation for purposes of section 552.103(a). Open Records Decision No. 588 (1991). You state that the information at issue relates to a pending administrative appeal before the Harris County Sheriff's Department Civil Service Commission. You have not indicated, however, whether the Civil Service Commission hearing is a contested case under the APA. Furthermore, you have not otherwise established that this hearing should be considered litigation for purposes of section 552.103(a). Therefore, you may not withhold the requested information under section 552.103.

Section 552.101 excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses confidentiality statutes. Section 157.904 applies to the personnel records of a sheriff's department in a county with a population of 2,000,000 or more. Local Gov't Code § 157.904(a). Section 157.904(h) provides as follows:

The sheriff or the sheriff's designee may not release an employee record or other information contained in an employee's permanent personnel file without first obtaining the employee's written permission, *unless the release of the record or information is required by law.*

Local Gov't Code § 157.904(h) (emphasis added). Section 157.904(h) requires that the consent of the subject employee be obtained when disclosure of information in the employee's personnel file is not required by the Act. You assert that because the submitted information is excepted from disclosure under a provision of the Act, the release of the information is not required by law and you must first obtain the employee's written consent. We disagree. Since the Act is law that requires release of information, you do not need written consent in order to release responsive information to the public as mandated by section 157.904(h). You may only withhold responsive information if it falls under one of the exceptions to disclosure under the Act. Therefore, we will address whether the other exceptions to disclosure that you raise are applicable.

We find that certain information contained in the submitted records is confidential under section 552.101 in conjunction with title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.* The ADA provides that information about the medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as a confidential medical record. In addition, information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his job, is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c). *See also* Open Records Decision No. 641 (1996). The Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and

related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual.” *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). We have marked the information that the commission must withhold under section 552.101 and the ADA.

We also note that the submitted information contains a Report of Separation of License Holder (F-5) which is made confidential by section 1701.454 of the Occupations Code. Section 1701.454 provides in relevant part:

- (a) A report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552 of the Government Code.

Occ. Code § 1701.454. The commission must withhold the F-5s of the named individual pursuant to section 552.101 Government Code in conjunction with section 1701.454 of the Occupations Code.

The submitted information contains fingerprint information protected from public disclosure by section 552.101 in conjunction with section 559.003 of the Government Code. Sections 559.001, 559.002, and 559.003 provide:

Sec. 559.001. DEFINITIONS. In this chapter:

- (1) “Biometric identifier” means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) “Governmental body” has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
 - (A) the individual consents to the disclosure;
 - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 559.001, .002, .003. Section 559.002 does not appear to permit the disclosure of the submitted fingerprint information to the requestor. Therefore, we conclude that the commission must withhold the fingerprint information that we have marked from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 559.003 of the Government Code.

Some of the records at issue are medical records, access to which is governed by the MPA, chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). For your convenience, we have marked the documents to show which are medical records subject to the MPA.

Section 552.101 also encompasses the doctrines of common law. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the

information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). This office has found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987). We have marked the types of information which the commission must withhold under section 552.101 in conjunction with common law privacy.

We also note that prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). We have marked some of the personal financial information that must be withheld under common law privacy. We note, however, that one of the submitted documents contain references to an employee's payroll deductions. We are unable to determine whether these payroll deductions are compulsory or whether they are the employee's personal financial choice. Therefore, to the extent that the deductions are mandatory, the information must be released. However, if the employee has voluntarily chosen to have these amounts deducted from his paycheck, this information is protected from disclosure based on a right of privacy. *See generally* Open Records Decision Nos. 600 (1992) (TexFlex benefits), 545 (1990) (deferred compensation plan).

We also note that the submitted records contain criminal history record information that is confidential under section 522.101 in conjunction with common law privacy. The United States Supreme Court has held that where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). We have marked those portions of the submitted documents that must be withheld under section 552.101 and the common law privacy concerns expressed in *Reporters Committee*.

You claim that the documents contain information that is excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(2) excepts from disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members regardless of whether the peace officer made an election under section 552.024 of the Government Code. Section 552.117(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We have marked the information that is protected under section 552.117(2) of the Government Code.

You also claim that portions of the requested information are excepted under section 552.119. Section 552.119 excepts from public disclosure a photograph of a peace officer¹ that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. This section also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. Open Records Decision No. 502 (1988). The submitted copies of photographs depict peace officers and it does not appear that any of the exceptions are applicable. You indicate that the peace officer in this instance has not executed any written consents to disclosure. Thus, we agree that you must withhold the photographs depicting peace officers which we have marked.

Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

You must withhold the Texas driver's license numbers and related information, which we have marked, under section 552.130.

We note that the information contains an e-mail address that has been provided by a member of the public for the purpose of communicating electronically with the governmental body. Section 552.137 provides in relevant part:

Sec. 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES.

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

¹ "Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

Gov't Code § 552.137. You do not inform us that the member of the public has affirmatively consented to the release of his e-mail address. Therefore, you must withhold the e-mail address under section 552.137.

We note that certain information is protected by section 552.136 of the Government Code. This exception to public disclosure makes certain account number information confidential. Section 552.136 provides in relevant part:

Sec. 552.136. CONFIDENTIALITY OF CREDIT CARD, DEBIT CARD, CHARGE CARD, AND ACCESS DEVICE NUMBERS.

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value;
or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We have marked the account number information that the commission must withhold under section 552.136 of the Government Code.

In summary, the commission must withhold the information which we have marked under section 552.101 and the ADA. The commission must withhold the F-5 information, which we have marked, under section 552.101 in conjunction with section 1701.454 of the Occupations Code. The commission must withhold the fingerprint information that we have marked from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 559.003 of the Government Code. Medical records, which we have marked, may only be released in accordance with the MPA. The commission must withhold the information which we have marked under section 552.101 in conjunction with common law privacy. To the extent payroll deductions are mandatory they must be released, however, voluntary payroll deductions are protected under common law privacy. The commission must withhold criminal history information, which we have marked, under section 552.101 in conjunction with the ruling in *Reporter's Committee*. The commission must withhold the peace officer's home address, home telephone number, social security number, and

information indicating whether the peace officer has family members under section 552.117(2). The commission must withhold the photographs depicting peace officers, which we have marked, under section 552.119. The commission must withhold the Texas driver's license numbers, which we have marked, under section 552.130. The commission must withhold the e-mail address, which we have marked, under section 552.137. The commission must withhold the account number, which we have marked, under section 552.136. The remainder of the requested information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "Joyce K. Lowe". The signature is written in a cursive, flowing style.

Joyce K. Lowe
Assistant Attorney General
Open Records Division

JKL/sdk

Ref: ID# 163299

Enc: Submitted documents

c: Paul G. Aman
Texas Coalition of Law Enforcement Officers
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(w/o enclosures)